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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 641.
AETNA LIFE INSURANCE COMPANY,
Petitioner,
vs.
JEANNETTE E. BARNETT AND LEON E. STROPP.

No. 642.
AETNA LIFE INSURANCE COMPANY,
Petitioner,
vs.
SAVINGS INVESTMENT & TRUST COMPANY.

No. 643.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
vs.
JEANNETTE E. BARNETT.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, SAVINGS INVESTMENT & TRUST COMPANY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT, SAVINGS INVESTMENT & TRUST COMPANY IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit is reported in 139 F. (2) (Adv. Op.) 483 and

is printed in the record (R. 559-565).* No opinion was filed by the District Court of the United States for the District of New Jersey.

Statement of Jurisdiction.

The Judgments of the Circuit Court of Appeals were entered on December 9, 1943 (R. 565-567). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Sec. 347(a)).

The grounds alleged in the petition to sustain the present application are (Pet. p. 6):

1. The Circuit Court of Appeals, in affirming the District Court's instructions to the jury has decided an important question of local law, in a way probably in conflict with applicable local decisions, and

2. The Circuit Court of Appeals, in affirming the District Court's rejection of an inventory and account of receiver (Ex. D-9, p. 86a, Vol. II; offered R. 347a), has decided an important question of federal law which has not been, but should be considered by this Court.

Statement of the Case.

To determine whether or not there is any basis for the present application a fuller statement than is contained in petitioners' brief is deemed necessary.

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* Page references are to Volume I of the record unless otherwise noted.

Three suits to recover the proceeds of three policies of insurance upon the life of one Robert J. Barnett, presenting the same questions of law and fact, were consolidated for trial. Respondents rested their cause of action on the New Jersey presumption of death statute (N. J. R. S. 3:42-1) which reads:

> "If a resident or nonresident of this state remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively, he shall, whenever his death comes into question, be presumed to be dead, *unless it is proved he was alive within that time.*"*

Respondents proved that following the disappearance of Robert J. Barnett from his home on December 28, 1932, the Glen Ridge police were notified (R. 152a) and a five-state alarm sent out (R. 153a, Ex. D-13, R. 101a, Vol. II; offered R. 483a).

In response thereto, the police received information from Fall River, Mass., that when the steamship "Plymouth" arrived at that port, a man was discovered missing and clothing found on the boat answering description of insured's (R. 153a). A few days later, the East Orange police brought back to Mrs. Barnett from the boat her husband's personal belongings (R. 50a, 52a).

The following persons testified that they had not seen or heard from insured since December 28, 1932:

> Jeannette E. Barnett, insured's wife (except for letter received December 29, 1932, Pet. p. 6) (R. 39a).

* Italics supplied unless otherwise noted.

Mrs. Minnie A. Barnett, his widowed mother (R. 110a).

Mr. William V. Barnett, his brother (R. 120a).

Leon E. Stropp, co-respondent with Mrs. Barnett in No. 641, a member of the firm of Kuhn, Loeb and Company, and a friend and business associate of insured (R. 97a).

J. Watson Wheeler, brother-in-law (R. 103a).

Mrs. Annetta E. Wheeler, sister-in-law (R. 106a).

Henry E. Freytag, East Orange businessman, friend and business associate of insured (R. 113a).

Harold H. Sherwood, President of Sherwood Refining Company, brother-in-law of insured (R. 132a).

Harry C. Griffith, New York advertising man, a friend and business associate of insured (R. 171a).

Edward W. Simpson, East Orange businessman, friend and business associate of insured (R. 330a).

Police Chief Higgins of Glen Ridge (R. 158a).

Detective Sergeant McGinley of the East Orange Police (R. 488a).

Police Chief Higgins testified at length with respect to the efforts made by the police to locate the insured, including the five-state alarm (R. 153a), all which brought no results (R. 158a), other than the information from Fall River, (*supra*, p. 3).

In addition, insured's brother and brother-in-law testified at length with respect to the efforts made by them to locate the insured, including advertisements in the New York and Boston papers (R. 119a, 120a, 121a, 132a).

Petitioners did not controvert the testimony offered by respondents but introduced testimony in an endeavor to show that Barnett had been seen alive within the seven-year period, and introduced some testimony of the financial difficulties of the insured at the time of his disappearance.

Petitioners state that they "proved by witness Cutsler that insured is not dead and was seen alive as late as November or December 1940" (Pet. p. 3), and that several witnesses saw or heard from him since December 28, 1932. They fail to point out, however, that the testimony of these witnesses was of such doubtful quality and character that no reliance whatsoever could be placed thereon. For example, petitioners' witness Cutsler, a bartender in the Blairstown Inn, testified that in November or December 1940, a man whom he identified from a photograph to be Barnett visited his bar five or six times (R. 463a). In June 1941, he testified two police officers whom he had never seen before visited him at his bar and, without preliminary conversation, showed him a picture and asked if he recognized the man. He told them he did, and forthwith signed a typewritten affidavit, which they had prepared before they ever met him and which on that one occasion they submitted to him for execution (R. 477a, 479a-481a).

Another example of the dubious testimony offered by petitioners is that of Marie Jordan Fosselli, whom petitioners assert "spoke with him on the telephone in February 1933" (Pet. p. 3), and who is claimed to have sent insured a telegram requesting money (Pet. p. 5). The facts are however, that this witness, contrary to her direct testimony, testified on cross examination, and again in answer to the Court's question, that she had never spoken to Bar-

nett over the telephone before the alleged telephone call of February 1933 (R. 298a). She admitted that the telegram (Ex. D-1, R. 71a, Vol. II; offered R. 233a) was false. Her entire direct testimony was amply demonstrated to be unworthy of belief. The testimony of the other witnesses produced by the petitioners was of the same unreliable nature. The jury returned verdicts in favor of respondents. The Circuit Court of Appeals succinctly summarizes the testimony of petitioners' witnesses as follows:

> "Two of the six defense witnesses (Bradshaw and Cutsler) were contradicted, in part, affirmatively in the plaintiffs' case. The believeableness of the others was seriously impaired by cross examination. Only one of them, Mrs. Jordan Fosselli, claimed to have known Barnett prior to his disappearance. That lady was patently discredited. The others, indicated the slightest of casual relationships with the person asserted to have been the assured. Of them, Messrs. Sullivan and Donlan, brothers-in-law, claimed to have seen Barnett in 1934 and identified him from the photograph shown them in 1940. They contradicted each other as to time; as to the description of the woman on whom Barnett is supposed to have called; and the circumstances of their intensive application to the matter in 1940 does not help the acceptance of their stories. A superintendent of an apartment house containing 300 people identified a picture of Barnett shown him in 1940 on the basis of his assertion that he saw the assured three times in 1933. The only other defense witness was a person connected with the boat on which the assured was last seen."

Petitioners assert in their Statement of the Matter Involved (Pet. p. 7) that respondents abandoned any claim

they had made to suicide. Neither the proofs submitted to petitioners or the complaints in these suits (R. 4a, 17a, 27a) asserted death by suicide. Throughout this litigation petitioners have attempted to create the impression or have labored under the misconception that respondents were relying on death by suicide (see colloquy between court and counsel, R. 321a). The Trial Court pointed out to the jury in his charge that evidence of suicide was merely a factor for their consideration (R. 528a).

At the conclusion of the case petitioners moved for a directed verdict (R. 518a; 524a) which was denied. The case was submitted to the jury which returned verdicts in favor of respondents (R. 535a). Judgments were entered for the full amount of the policies, together with interest from date of filing of proofs.

These judgments were appealed to the Circuit Court of Appeals for the Third Circuit, petitioners contending that:

1. The Trial Court erred in denying petitioners' motion for a directed verdict.

2. The Trial Court erred in its charge to the jury.

3. The Trial Court erred in excluding proof of the practice on the steamer "Plymouth" with respect to the collection of tickets on disembarkation.

4. The Trial Court erred in excluding petitioners' testimony with respect to the defalcation and financial troubles of insured Barnett (which proferred testimony included an inventory and account of receiver (Ex. D-9)), and with respect to the criminal complaint and indictment found against him.

The Trial Court's rulings and its charge to the jury were in all respects affirmed by the Circuit Court of Appeals for the Third Circuit.

Except in respect to the Trial Court's charge to the jury and the ruling on the admissibility of the inventory and account of receiver (Ex. D-9), petitioners acquiesce in the disposition made of their contentions by the Circuit Court of Appeals (Pet. Br. p. 11). The petitioners now urge these two exceptions as reasons why writs of certiorari should issue to the Circuit Court of Appeals for the Third Circuit.

Summary of Argument.

Respondent Savings Investment & Trust Company, submits that the petition for writs of certiorari should be denied because:

1. The Trial Court's charge to the jury, affirmed by the Circuit Court of Appeals, was in all respects proper and in accordance with the applicable law of New Jersey.

2. The Circuit Court of Appeals, in correctly affirming the Trial Court's ruling with respect to the inadmissibility of the inventory and account of receiver (Ex. D-9) has not decided an important question of federal law which has not been, but should be considered by this Court.

I.

The Trial Court's charge to the jury, affirmed by the Circuit Court of Appeals, was in all respects proper and in accordance with the applicable law of New Jersey.

(a) Plaintiff-respondent established the conditions set forth in New Jersey Revised Statutes 3:42-1, and Robert J. Barnett is therefore presumed to be dead.

The Revised Statutes of New Jersey (R. S. 3:42-1) provide that a resident or non-resident of this state shall be presumed to be dead whenever his death comes into question if he "remains beyond the sea, absents himself from this state or from the place of his last known residence, or conceals himself in this state or in the place of his last known residence, for seven years successively". The presumption is overcome only if it is proved that he was alive within that time.

To bring a case within the statute, all that need be proved are facts showing that the insured has absented himself from the place of his last known residence for a period of seven successive years, and has not been heard from during that period, *Osborn* v. *Allen*, 26 N. J. L. 388 (Sup. Ct. 1857), and that due inquiry has been made to ascertain whether he is alive, *Armstrong* v. *Armstrong*, 99 N. J. E. 19 (Ch. 1926). In *Osborn* v. *Allen, supra*, Chief Justice Green said (26 N. J. L. 390):

> "All the proof that can be required or expected is, that the party has been absent from the state, or from his family or home, and has not been heard from within the period prescribed by the statute."

Respondents offered uncontroverted testimony that Barnett disappeared and absented himself from the place of his last known residence (Glen Ridge, New Jersey) for seven successive years, and proved that efforts of the police and members of the family to locate him were without success, and that he had not been seen or heard from since December, 1932, by the police, the members of his family, friends or close business associates (See Statement of Case, *Supra*, pp. 3-4).

In view of this proof submitted by respondents, which was not contradicted or disputed by petitioners, there can be no doubt that the conditions of the statute above set forth were fully satisfied and that the jury properly determined that respondents established the elements essential to recovery. Therefore, Robert J. Barnett is presumed to be dead, unless it was established as a matter of fact that he was alive within the statutory period.

(b) By the express language of the New Jersey Statute (R. S. 3:42-1), this presumption may be overcome only by establishing the fact that Robert J. Barnett was alive within the period set forth in the Statute.

When the conditions set forth have been satisfied the statute (R. S. 3:42-1) provides that whenever the death of such absent person comes into question, he shall be presumed to be dead "*unless it is proved he was alive within that time.*" The statute, in its own unequivocal language, provides under what circumstance the presumption is overcome. That circumstance is the establishment as a matter of fact that Barnett was alive within the seven-year period. In *Smith* v. *Ex'rs of Smith,* 5 N. J. E. 484 (Ch. 1846) Chancellor Halstead said (5 N. J. E. 485):

> "The statute provides that any person who shall absent himself or herself from the state for seven years successively, shall be presumed to be dead, unless proof be made that he or she was alive within that time. The bill states that Jasper B. Smith left the state in 1829, and that he has never been heard from since. The answer admits his absence from the state since 1829, but says he has been heard from. * * *
>
> The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from, the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or rather, to prevent its arising, can do it only by *showing that the absent person was alive within the seven years.*"

Robert J. Barnett is, therefore, presumed to be dead, and this presumption is binding upon petitioners unless they have established as a matter of fact that *he was alive* within the statutory period.

(c) The party seeking to avoid the presumption of death must establish the fact that Robert J. Barnett was alive within the statutory period.

After quoting the New Jersey presumption of death statute, the Trial Court charged the jury (R. 527a, 529a):

> "You are instructed that under the provisions of the statute the burden is upon the plaintiffs in the first instance to prove not actual death but absence of the insured from either the state or his place of residence for a period of seven years, seven successive years next preceding the filing of the

proof of death with the defendant. This date is fixed as of February 27, 1940. Upon adequate proof of these facts, which in law are recognized as sufficient to support a presumption of death, the insured is presumed to be dead unless it is proved by the party who disputes the presumption that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. Therefore in the instant case if you find that the insured was absent from the state or from his residence for a period of seven years next preceding the filing of the proof of death, and is therefore presumed to be dead, your verdict shall be in favor of the plaintiffs and against the defendants, unless, of course, you find that the insured was, in fact, alive at any time during the period.

"Here the presumption of death is disputed by the defendants, who allege that the insured was, in fact, alive within the seven years next preceding the filing of the proof of death. [You are instructed that under the statute the burden is upon the defendants to prove by a fair preponderance of the evidence that the insured was, in fact, alive within the period.]

* * * * * *

"* * * as I stated to you, in the first instance, the burden is on the plaintiffs to establish the elements essential to recovery by a fair preponderance of evidence, and [I have instructed you that the burden is on the defendants to establish by a fair preponderance of evidence that the insured was, in fact, alive] * * *."

It is submitted that this is a correct statement of the law relative to the burden of proof in a suit instituted under

the presumption of death statute and that the Circuit Court of Appeals properly found (R. 563):

> "The appellants' next point is that the court erred in its charge with respect to burden of proof. They attempt to isolate two sentences from the charge in support of this. A reading of the entire charge shows the trial court to have fairly presented this phase of the matter to the jury."

The same two sentences that petitioners have again attempted to isolate on this application (Pet. Br. p. 12) are indicated by the brackets inserted in the above quoted portion of the Trial Court's charge (*supra*, p. 12).

The burden, of course, is on the respondents to establish the elements giving rise to the statutory presumption of death. In other words "the plaintiff has the burden of proving his case * * *" (Mr. Chief Justice Brogan in *Schlosser* v. *Goldberg*, 123 N. J. L. 470, 473 (Sup. 1939), (Pet. Br. p. 14). Respondents did establish the elements entitling them to recovery (Point I(a), *supra*).

But, respondents do not, as petitioners erroneously contend (Pet. p. 8; Pet. Br. p. 10), bear the burden of sustaining the affirmative of the question whether or not the insured is dead. Petitioners' entire attack upon the Trial Court's instructions to the jury is based upon this false premise, which is not the issue in this case.

All three suits consolidated herein were instituted under the presumption of death statute (R. S. 3:42-1). (See Complaints, R. 4a, 17a, 27a). The provisions of this statute are clear. Respondents must establish the essential elements set forth therein. When they have done this, the statutory

presumption arises, and is overcome only by establishing the fact that the insured was alive within the statutory period. The Trial Court correctly charged the jury that the burden was on respondents to establish the elements giving rise to the presumption, and correctly charged that the burden was on petitioners to establish that the insured was, in fact, alive within the statutory period.

The cases arising under this statute and considering this particular point have sustained the clear language of the statute. In the words of Chancellor Halsted:

> "The words of the statute and the reason of the thing require that, unless proof be made that the person absenting himself has been heard from the presumption of his death arises at the expiration of seven successive years of absence. The party seeking to avoid this presumption, or, rather, to prevent its arising, can do it only by showing that the absent person was alive within the seven years." (*Smith* v. *Ex'rs. of Smith,* 5 N. J. E. 484, 485, *supra,* p. 11).

And in *Hoyt* v. *Newbold,* 45 N. J. L. 219 (Sup. Ct. 1883), Mr. Justice Joel Parker said (45 N. J. L. 222):

> "The plaintiff insists that the burthen of proof is on the defendant to show that Abraham Tuers, Jr., was dead when the deeds to plaintiff were given. The language of the statute will not admit such construction. The presumption of death after continued absence of over seven years successively, *must be overcome by proof** that the person was living."

And, quoting from 2 *Greenl. on Ev.,* sec. 278, the court continued (45 N. J. L. 222):

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* Emphasis by the Court.

> "* * * the rule is now settled for most judicial purposes that the presumption of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time they were last known to the living, after which the burthen of proof is devolved on the party asserting the life of the individual in question."

The above cases were recently cited and quoted by the New Jersey Court of Errors and Appeals in *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320 (E. & A. 1935).

A similar result was reached by the Court of Errors and Appeals in *Goodman* v. *Lehigh Valley R. R. Co.*, 78 N. J. L. 317 (E. & A. 1909). In this case the court considered the effect of the statute providing certain proof shall be *prima facie* evidence of violation of the statutory provisions relative to spark arresters on railroad engines (now incorporated in R. S. 48:12-86). The court said (78 N. J. L. 321):

> "Somewhat similar provisions were contained in sections 13 to 17 of the General Railroad Act of 1874. *Gen. Stat.* pages 2670, 2671. In *Wiley* v. *West Jersey Railroad Co.* (1882), 15 *Vroom* 247, 250, the Supreme Court was called upon to construe the sixteenth section, which declared 'that in every action for the recovery of damages for an injury done to the property of any person or corporation by fire communicated by a locomotive engine of any person or railroad corporation in violation of the preceding sections of this act, proof that the injury was so done shall be *prima facie* evidence of such violation, subject, nevertheless, to be rebutted by evidence of the taking and using all practicable means to prevent such communication of fire as by said section required.' In that case the plaintiff claimed that by

> evidence tending to show that the fire was communicated by an engine of the defendant company, the burden of proof was cast upon the defendant. The latter, on the other hand, denied that the law became applicable until the plaintiff should further show that the fire was communicated in violation of the preceding sections of the act, that is, for want of the use of screens or some other practicable means. The court rejected the latter contention on the ground that to accept it would render the section utterly futile, and held that the legislative design was to declare that when fire was communicated to property by any locomotive engine, that fact should be *prima facie* evidence that all practicable means had not been employed by the company to prevent the communication of fire, *and so placed upon the company the burden of proving the exercise of due care.*
>
> "With this construction we agree."

Cases arising under the New Jersey Negotiable Instruments Law further illustrate the effect statutory provisions have upon the question of who bears the burden of proof in certain situations. In *Crown Capital Corp.* v. *Broderick,* 130 N. J. L. 198 (Sup. 1943) the New Jersey Supreme Court reviewed an action brought in the District Court of Middlesex County, on a promissory note, wherein the issue was whether or not the note had been paid. In reversing judgment entered for defendant, the Court said (130 N. J. L. 199, 200):

> "When the plaintiff produced the note in evidence it was made out a *prima facie* case. It was not necessary to establish the amount due on the note for the burden of proof of payment rests with the defendant. *Trustees System Company of Newark* v. *Lisena,* 106 N. J. L. 549; 150 Atl. Rep. 373."

* * * * * *

"Plaintiff below not only made out a *prima facie* case but also became entitled to the benefits conferred by that provision of our Negotiable Instrument Law which sets forth that 'every holder is deemed *prima facie* to be a holder in due course.' *N. J. S. A. 7:2-59.* It was incumbent upon the defendant to show that the instrument was not complete or regular on its face, or that the plaintiff became the holder after the due date of the instrument and with notice of its having been dishonored, or that plaintiff took the instrument in bad faith without paying value, or finally that at the time of negotiation to it, plaintiff had notice of an infirmity in the instrument or a defect in the title of the person who negotiates it. See *N. J. S. A.* 7:2-52 and *Fidelity Union Trust Co.* v. *Decker Building Material Co.,* 106 N. J. L. 132; 148 Atl. Rep. 717; *Byron* v. *Byron, Hefferman & Co.,* 98 N. J. L. 127; 119 Atl. Rep. 12."

In *Trustees System Co.* v. *Lisena,* 106 N. J. L. 549 (E. & A. 1930), cited in the *Crown Capital Corp.* case, *supra,* the New Jersey Court of Errors and Appeals held that, in an inquiry whether a note, recently given and still outstanding, has been paid, the burden of proof rests on the debtor. And in *Fidelity Union etc. Co.* v. *Decker, etc., Co.,* 106 N. J. L. 132 (E. & A. 1930), also relied upon in the *Crown Capital Corp.* case, *supra,* the Court of Errors and Appeals held that the legal presumption is that the holder of a negotiable instrument transferred to him, before maturity, is a *bona fide* holder for value, and the burden rests upon the defendant to establish otherwise, saying (106 N. J. L. 135):

"The burden was upon the appellants to establish, in order to escape liability, that the plaintiff-

> respondent had knowledge of the infirmity in the note in question at the time it was discounted, and further, that the proceeds of the said note had not been checked out by the bank."

Under the law of New Jersey respondents were required to establish the conditions expressly set forth in the presumption of death statute. When these conditions have been established (as they were here), the insured is presumed to be dead "unless it is proved he was alive within that time". And it is submitted that the Trial Court properly charged the jury that petitioners bore the burden of establishing that the insured was, in fact, alive within the statutory period and that the charge to the jury was in all respects proper and in accordance with the applicable law of New Jersey.

II.

The Circuit Court of Appeals, in correctly affirming the Trial Court's ruling with respect to the inadmissibility of the inventory and account of receiver (Ex. D-9) has not decided an important question of federal law which has not been, but should be considered by this Court.

At the trial of this cause, petitioners introduced testimony as to the financial troubles of the insured. Part of the evidence proffered was an inventory and account of receiver in the insolvency proceedings of the Discount Corporation (Ex. D-9, 86a, Vol. II; offered R. 347a). Petitioners' contention is that this document was excluded solely because

the provisions of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695) were not properly interpreted and applied to this case. This is not so.

Petitioners fall into error at the outset of their argument by presuming that the conclusions contained in the proffered document were material and relevant to the present litigation. This exhibit was offered in support of petitioners' theory that the insured did not commit suicide, or to show a possible motive for the disappearance of the insured. In either case, this exhibit was not relevant or material to the actual issues involved in this suit, and when evidence of the insolvency proceedings of the Discount Corporation was offered, respondents objected thereto on the grounds that it was immaterial and irrelevant (R. 343a).

Throughout this litigation petitioners have endeavored to create the impression that respondents were attempting to prove death by suicide. This is not so (see colloquy between court and counsel, R. 321a). And any explanation of his absence has no effect whatever upon the presumption in New Jersey, for the statute of New Jersey has significantly omitted the phrase "unexplained absence", a component part of the common law rule, and which formed a part of the presumption involved in *Equitable Life Assur. Soc.* v. *Sieg*, 53 F. (2) 318 (C. C. A. 6th, 1931), cited and relied on by petitioners (Pet. Br., p. 28).

In *Meckert* v. *Prudential Ins. Co.*, 114 N. J. L. 320, (E. & A. 1934), Judge Kays said (114 N. J. L. 322):

> "Irrespective of the decisions by the courts of this state, counsel for appellant argues that the fact that the insured was a fugitive from justice overcomes the presumption of death to which the above-

> mentioned statute refers. The fact that the insured was wanted for forgery or other crimes may have been a motive for disappearing but such reason would not be sufficient for remaining away for a period of over seven years and, therefore, such fact would not overcome the presumption of death as a matter of law."

The clear language of the statute and the decision in the above case leads one to the inescapable conclusion that "the fact that he is a fugitive from justice or has had family or domestic difficulties, or has fled from the stigma of some disgrace has no effect upon the presumption of death if he has disappeared and not been heard from for the statutory period of seven years" (5 Mercer Beasley L. R., p. 7).

The express purpose for which the inventory of the receiver of the Discount Corporation was offered and the reasons for its exclusion by the Trial Court were (R. 344a):

> "The Court: This record, as I understand it, is offered for the limited purpose of establishing the fact that the Discount Corporation was insolvent.
>
> "Mr. Markley: Yes, sir.
>
> "The Court: At the time of his disappearance.
>
> "Mr. Markley: Absolutely.
>
> "Mr. Waldau: The final decree would do that.
>
> "Mr. Vanderbilt: May I be heard on that, your Honor?
>
> "The Court: Yes, you may.
>
> "Mr. Vanderbilt: This contains much more than that. What they want to prove is that there was a decree of insolvency and appointment of a receiver; they may readily do that by putting in evidence the decree. I will save them the time by admitting on

such and such a day that a receiver was appointed in the Court of Chancery of New Jersey, but that contains utterly extraneous matter, offered solely for the purpose of getting facts to the jury that they know they can't prove and which we had nothing to do with and no opportunity to be heard. A document which is full of speculation and conjectures. And, if your Honor desires, I would be glad to point out the particular parts that I think are open to that objection.

"The Court: Oh, yes. It is apparent on the face of it that the conclusions drawn by Mr. Farr are conclusions which can be drawn in this case only by the jurors.

"Mr. Vanderbilt: They are not complete.

"The Court: No, I am afraid that this particular document, which is the inventory and account of the receiver—inventory and account of the receiver is so filled with conclusions that might be prejudicial that I won't allow that particular document, *since your admitted purpose is to establish that the company was insolvent at the time* the absentee, Mr. Barnett, disappeared. The conclusion of the Court of Chancery as to that, which is embodied in the decree, should be ample to establish that fact." .

Petitioners' admitted sole purpose was to show that the Discount Corporation was insolvent at the time of the insured's disappearance. The decree of insolvency was received in evidence (Ex. D-10; offered R. 347a) and was read to the jury (R. 348a). Petitioners have not included this decree in the printed record. Insured's association with the Discount Corporation and its financial difficulties were fully presented to the jury, as were the facts that at the time of his disappearance it was discovered that the cor-

porate records were missing from the safe; that these had been in the possession and care of Barnett; and that Barnett was the only one who had access to the safe (R. 334a, 342a).

The Circuit Court of Appeals, in considering the Trial Court's ruling, said (R. 563):

> "The appellants offered in evidence a copy of the inventory of this particular company called 'The Discount Corporation'. It was offered for the purpose of showing that the company was insolvent at the time the assured disappeared. That fact was already in this trial record; the decree of the Court of Chancery to that effect being in evidence. The inventory contained conclusions of appraisers and an auditor. A criminal complaint and criminal indictment both against the defendant, were offered by the defense and rejected by the court.
>
> * * * * * *
>
> "There was no harmful error in the rejection of these documents."

Petitioners now urge that this Court should grant writs of certiorari on the ground that (Pet. p. 8) "The Circuit Court of Appeals in affirming the District Court's rejection of the inventory and account of receiver (Exhibit D-9) which was clearly admissible under 28 U. S. C. 695 has decided an important question of federal law which has not been but should be considered by this Court."

The Circuit Court of Appeals did not render any opinion relative to the applicability of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695), for it is perfectly obvious that any such decision was wholly unneces-

sary in this case. Even assuming for the purposes of argument that this document was material and relevant, the Circuit Court of Appeals did not decide a novel question of law, but followed the recognized federal rule that an alleged error in excluding evidence as to a certain fact is harmless error and not grounds for reversal where the fact is established by other evidence;

Northern Pac. R. Co. v. *Mortenson,* 63 Fed. 530 (C. C. A. 8th, 1894); *Error dismissed,* 166 U. S. 997 (1896);
Drumm-Flato Commission Co. v. *Edmission,* 208 U. S. 534 (1908);
Cannon v. *Pratt,* 99 U. S. 619 (1878);
Proechel v. *U. S.,* 59 Fed. (2) 648 (C. C. A. 8th, 1932), *cert. den.* 287 U. S. 658 (1932).

The Circuit Court of Appeals, in affirming the Trial Court's ruling relative to this document, clearly did not decide an important question of federal law which has not been but should be considered by this Court.

Again assuming, but not conceding, for the purposes of argument that petitioners' position is sound, the inventory of the receiver of the Discount Corporations is patently inadmissible under the provisions of the Act of June 20, 1936, 49 Stat. 1561 (U. S. C. A. Title 28, Sec. 695) which provides:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made

> in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term 'business' shall include business, profession, occupation, and calling of every kind (June 20, 1936, c. 640, Sec. 1, 49 Stat. 1561.)"

The object of this statute was to do away with technical rulings which excluded records ordinarily used in business transactions when not formally identified by the makers and to bring decisions of all federal courts into line with the modern rule that it is sufficient to show that the entry is contained in a book of regular entries maintained in the establishment without producing the particular person who made the entry and having him identify it, *Ulm* v. *Moore-McCormack Lines,* 115 Fed. (2d) 492, (C. C. A. 2d, 1940), *rehearing denied,* 117 Fed. (2d) 222 (1940), *Cert. den.* 313 U. S. 567 (1941); *Hoffman* v. *Palmer,* 129 Fed. (2d) 976 (C. C. A. 2d, 1942), *affirmed,* 318 U. S. 109 (1943).

When tested against the provisions of the above statute and its interpretation by this Court in *Palmer* v. *Hoffman,* 318 U. S. 109 (1943), the inventory and account of receiver is clearly inadmissible, even assuming this to be the sole basis for its exclusion.

Conclusion.

The decision of the Circuit Court of Appeals, affirming the Trial Court's charge to the jury, did not decide an important question of local law probably in conflict with local decisions, but acted in accordance with the applicable law of New Jersey. Nor did the Circuit Court of Appeals decide an important question of federal law arising under the Act of June 20, 1936, 49 Stat. 1561, which has not been but should be considered by this Court.

It is, therefore, respectfully submitted that this Court should deny the petition for writs of certiorari.

Respectfully submitted,

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